their view in the following manner, "The General Term also thought the judgment would be evidence as a declaration or admission by the plaintiff of the facts, or some of them, which the witness would have to prove in her action against him for dower. Any declaration or admission made by the plaintiff as to any fact material for the witness to prove in her action, is undoubtedly admissible as an admission. If found in a pleading, and it be shown that it was placed there with the knowledge and sanction of the plaintiff herein, such pleading would be admissible for the purpose of proving such admission. In order, however, to prove such admission, it is not necessary or proper to put in evidence the judgment in the action, for it is not the judgment which furnishes the proof, but the admission contained in the pleadings, and the judgment is not in that case the least evidence in favor of the witness in any action she might bring. The admission would exist without the judgment and regardless of it. * * * The cases cited from 1 GREENLEAF, EVIDENCE, 527a, are those where it was claimed the party had made an admission in a declaration or other pleading, or had suffered default, and it was held such express admission, or such constructive admission by suffering a default, was competent evidence against him. We do not doubt the correctness of this rule. It is not the judgment which is to form the evidence. It is the admission contained in the pleading or by the suffering of the default." From this it is clear that the court had in mind an actual admission or statement contained in a former pleading. It was not the case of an admission derived from a default, much less a case where the judgment by default was never actually entered. The doctrine of the principal case, while helpful to some degree in arriving at the truth, nevertheless disregards the necessities which may have prompted a party to suffer a default, or which may have caused him to refuse to defend the suit. These considerations would seem particularly appropriate when applied to a suit for divorce, but the Missouri court, in answer to this objection, states that such elements "might be considered as to the weight to be given to the petition as evidence, but do not go to its competency." S. E. D.

SHOULD A NAME BE PROTECTED AS "PROPERTY"?—The United States District Court for the Western District of Missouri has recently decided that there is no property right in a name as such, and that if a case presents no question of libel *per se*, of special damages resulting from the act of the defendant, or of trade-mark, trade-name, or unfair competition, a court of equity will not interfere to prevent the use of complainant's name by another. *Vassar College* v. *Loose-Wiles Biscuit Company*, 197 Fed. 982. In this case the complainant college sought to restrain the use of its name Vassar, its seal and other insignia, upon the boxes of chocolates and candies manufactured by the defendant. The complainant claimed a right of property in its name, etc., which entitled it to exclude all others from using them. The court denied the existence of the right claimed, and inasmuch as complainant

admitted its inability to prove special damages to any other property right, the court refused the injunction sought.

The existence of an abstract right of property in a name has never been judicially sustained either in England or the United States; in fact, that personal names are the subject of ownership in the abstract, has been denied in two English cases and by a dictum in at least one American case. *Du Boulay* v. *Du Boulay,* L. R. 2 P. C. 430, 6 Moore's P. C. Cases (N. S.) 31; *Cowley* v. *Cowley* (1901) App. Cas. 450; *Olin* v. *Bate,* 98 Ill. 53. A person has an unlimited right to change his name or to use any name he pleases, provided he does neither with fraudulent intent. 21 HALSBURY, LAWS OF ENGLAND, 349; 29 CYC. 271.

The right to exclude others from the use of a name is only sustained in certain special cases depending upon principles not peculiar to the use of names. Thus a trade name is merely incidental to the trade goodwill which it symbolizes; in order to maintain property rights in the latter, the use of the name must be made exclusive within a certain sphere. But the same protection is accorded to any other thing which represents trade goodwill, whether it is the form or dress of an article in trade or any other means by which an article has come to be identified in the trade. The "property" in none of these symbols extends beyond the limits of the trade in which they have been appropriated. NIMS, UNFAIR BUSINESS COMPETITION, § 12; HESSELTIN, LAW OF TRADE-MARKS AND UNFAIR TRADE, 88, 92. In short, the law aims to protect trade goodwill and forbids injury thereto, but it is a matter of no significance whether the wrong is accomplished by the improper use of a trade name, or by any other means.

The right to exclude others from the use of a name has also been frequently recognized in cases of the type of *Walter* v. *Ashton* (1902) 2 Ch. D. 282. See also *Routh* v. *Webster,* 10 Beav. 561; *Vanderbilt* v. *Mitchell,* 72 N. J. Eq. 910, 67 Atl. 97; *Edison* v. *Polyform Mfg. Co.,* 73 N. J. Eq. 136, 67 Atl. 392. Such are cases where a complainant is exposed to the risk of financial loss or responsibility by the unauthorized use of his name in a manner calculated to hold him out to the world as owner, partner, etc., of some enterprise. Manifestly there is no necessary connection between the holdings of these cases, and the recognition of property rights in a name. As in the cases of tradenames above, these are injuries to property, in which a name serves as the means of perpetrating wrong. The question whether a name is property has almost never been discussed apart from questions of defamation (see in particular *Clark* v. *Freeman,* 11 Beav. 112; *Dockrell* v. *Dougall,* 80 L. T. Rep. 556. This fact is due, it would seem, to the close association of a name with reputation (or good name). But in cases of this class, the situation is analogous to that outlined above—a name is simply one of the means used to accomplish a wrongful act; it connects the party defamed with the defamatory matter, implied or expressed; in this instance, reputation corresponds to the property rights above; the law applied is that of defamation, and is not peculiar to the use of names.

Without considering more cases we then venture the conclusion: That all cases in which the use of names was involved can be, and in fact were,

based upon principles in no sense peculiar to the names, but upon the common principle of the law of tort—viz.: Granted that a person may change his name or take or use any name he pleases, nevertheless he may not exercise these rights in such a way as to appropriate, injure, or expose to injury the property of another, injure another's reputation, or do any other unlawful act.

Notwithstanding the decision in the principal case, and in spite of what has been said above as to the law of names as it now stands, the injustice of allowing the name of one party to be exploited by another for purposes of financial profit, entirely against the will of the person whose name is used, and to his possible detriment, cannot fail to strike everyone. That one person ought not so to use another's name is clear. Equally manifest and just is the claim which a person makes to any value which attaches to his name in the form of reputation or notoriety; the value is something brought into existence (usually) by the effort of the individual, and his moral claim to its exclusive enjoyment is exactly the same as that which he has to any other thing which he has created. In the case of *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, where a personal likeness was used without consent on an article in trade, GRAY J., dissenting, said he thought that, "this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes, as she would have if they were publishing her literary compositions, * * * If her face or her portraiture has a value, the value is hers exclusively, until the use be granted away to the public." And in *Munden* v. *Harris,* 153 Mo. App. 652, the court said, "One is not compelled to show that he used or intended to use any right which he has, in order to determine whether it is a valuable right, of which he cannot be deprived, and in which the law will protect him. The privilege and capacity to exercise a right, though unexercised, is a thing of value—is property of which one cannot be despoiled. If one has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent. It must strike the most obtuse that a claim of exclusive right to one's picture is a just claim." See also *Corliss* v. *Walker,* 57 Fed. 434; 3 MICH. L. REV. 559; 4 HARV. L. REV. 193. The reason for these expressions seem to apply with equal force to cases such as we are considering. Why should a stranger be permitted to appropriate the value which a party has, by his efforts and industry, caused to become attached to his name, any more than he can appropriate the value of a personal likeness, the writings of another, or trade-goodwill? The same arguments are applicable, where, as in the principal case the complainant is a corporation, although of course in a less degree, and with proper modifications.

Conceding that complainant has a moral right to be protected in the use of its name, insignia, etc., the more difficult questions then arise—Is such a right capable of legal recognition? If so, how shall it be recognized and protected? The answer to the questions should depend entirely upon the practicability, and the utility from the public view-point, of granting a legal remedy, and of granting the particular legal remedy. In the principal case, the court lays much stress upon the fact that the right claimed is novel; its negative attitude in this regard is illustrated by the following sentence as

to remedies in libel cases, "Legal remedies in such cases have always been thought to be adequate." The court supports its negative position largely by passages from cases denying the now well recognized right of privacy. It is submitted that any argument based upon the previous non-existence or non-recognition of a right is not, alone and of itself, entitled to a great deal of weight as opposed to the fundamental principle that the law must grow. However, the constitutionality of recognizing a right raises an entirely different question. The following passage from the close of the court's opinion is entitled to very serious consideration: "Individual conception of justice is not law, to make it law is a legislative act, forbidden by the constitution to the courts. If the use of a name in commercial publications, as in the case at bar, be deemed an unwarranted invasion of personal rights, it is within the province of the legislature to so declare. The courts cannot create rights unknown to the common law, and not provided by statute."

The passage just quoted suggests the most feasible way in which the individual may be given limited rights of exclusive user of his name,—viz., by legislation. Limited rights of property in names have been established in Germany by the civil and commercial codes. SCHUSTER in the PRINCIPLES OF GERMAN CIVIL LAW, § 80(b) says: "A person may assert the right to use his family name, if any other person makes an unauthorized use of the name. An injunction may be obtained restraining the act complained of as well as any repetition of the offense." Citing B. G. B. 12. And in § 80(c), "The name under which business is carried on by a single trader, or partnership, or company must be chosen in accordance with general rules laid down by H. G. B. 15-25, 29-31; a person using an unauthorized firm name may be punished by fine and restrained from the continuance of such unauthorized use on the application of any party aggrieved thereby. The grievance need not necessarily be founded on the fact that the aggrieved person is himself a trader or member of a partnership having a firm name identical with or similar to the unauthorized firm name. The mere fact that the name of a private person is used in violation of the rules in respect of the choice of firm names may give a right of action to such person. Damages may be recovered on the same grounds as in the case of the unauthorized use of a private name, H. G .B. 37(2)." A similar right has been declared in French law by various ordinances, and is generally recognized by French jurists (see authorities on French law cited and discussed in *Du Boulay* v. *Du Boulay*, L. R., 2 P. C. 430, 6 Moore's Cases (N. S.) 31). The fact that these countries have established property rights in a name is in itself strong evidence of the practicability of protecting a name in certain cases as property.

But the statutes which exist in our states regulating changes of names by corporations and persons, apparently propose simply to declare or enforce the tort principle stated above, and contain no recognition of property rights in names. STIMSON, AM. ST. LAW, § 8092; CAL. CODE CIV. PROC., § 1275-79, 1905 STAT. AND AMEND. TO CODE (Cal.), 40.

What has been said above is not to be understood as a recommendation of absolute property rights in a name, nor as a criticism of the courts for not

recognizing such rights; on the contrary it would seem that our courts have been wise in the denying the existence of so broad a right; it is certain that protection of a name as property might be extended too far, and might become in its turn a cause of great annoyance and confusion (to say nothing of the difficulties of legally enforcing rights of that kind). However, any attempt to place limits on this right must be idle, until we have had more experience concerning it; but it may be of advantage to consider some instances in which it would seem that protection should be accorded to the individual either as regards his name or something for which it stands.

The existence of property rights in a name has been judicially denied; for that reason judicial development of the law for the purpose of protecting the rights just mentioned, can now conceivably occur only in two directions,—viz.: by the development and extension of recognized personal rights, or of recognized property rights, in such a way as to cover the same field (or a part of it) which would be embraced within the abstract right of property in a name.

The distinction between the right to a good name and the right of ownership of a name is fundamental, but it is nevertheless quite true that the two things are very closely related. For many practical purposes the same needs which would be met by recognizing and protecting property rights in a personal name would also be served by taking a broad view as to what publications are libellous *per se*. In practice it is not often the use of the name itself to which objection is made; usually the real basis of complaint is some harm to reputation with which that use is inseparably involved. Thus in *Peck* v. *Tribune Co.*, 214 U. S. 185, 53 L. Ed. 960, a false statement that plaintiff had used a certain brand of whiskey as a medicine, and that she allowed her name to be used as recommending it, was held to be libellous *per se*. See also *Hart* v. *Derm. Inst.*, 98 N. Y. Supp. 1000; *Foster-Milburn Co.* v. *Chinn*, 134 Ky. 424, 120 S. W. 364. Thus it is conceivable that the use of a physician's name in connection with an endorsement of a quack medicine might be considered libellous *per se*. Such use of a name could be considered as a representation that it was authorized by the physician, and inasmuch as the implied representation would be false and amount to calling a physician a quack, a case of libel *per se* would be established. (See 24 L. R. A. (N. S.) 997 where an analogous extension of the principles of libel is suggested as a possible means of developing a right of privacy on common-law grounds. What has just been said as to libel would likewise apply to development along the lines of the right of privacy.

But the gap left by the refusal to recognize property rights in a name, can be covered only very inadequately by the extension of personal rights as just suggested. Purely impersonal injuries, due to the improper use of a name, would be omitted entirely,—such are injuries to corporate reputation, or privacy, and injuries to the reputation of things. These will be touched upon below. There are, moreover, two distinct advantages, pertaining to the remedy, to be gained by recognizing or developing the above rights as forms of property, instead of protecting them as personal rights.

First, the fact that equitable relief is afforded to protect only property, and

not personal, rights, results in a serious drawback to the development of the rights in question as personal rights. Equitable protection is very much to be desired in cases of injuries to such intangible rights as those in question. It is a notorious fact that in the analogous cases of infringement of trade-marks, patents, etc., the legal action is very inefficient; the cost of suit, owing to the difficulty of proving damages over and above nominal damages, is frequently as great as the amount recovered. The narrow view that equity protects only property rights has been severely criticized by a few dicta, etc., but it has never been repudiated in any case. 37 L. R. A. 787; *Vanderbilt* v. *Mitchell*, 72 N. J. Eq. 910; *Schuyler* v. *Curtis, supra.* This rule has been changed in England by the JUDICATURE ACT (Chap. 25, sec. 8) which provides that an injunction shall issue whenever it is just and convenient. This statute has been construed to authorize injunctions even in cases of purely personal libel and slander. 18 HALSBURY, LAWS OF ENGLAND, 733; *Monson* v. *Tussaud* (1894) 1 Q. B. 671, 690, 698.

Second, that proof of special damages is unnecessary to a right of action either in law or in equity where the act complained of is injurious to a property right. Where the tendency of an act is clear and its injurious consequence inevitable, the law requires no proof of damage but esteems the act wrongful as a matter of law. It seems reasonably clear that in cases of alleged injury to property in professional or other reputation by the improper use of a name, the causal connection at least is sufficiently close to satisfy the above principle. The case is almost the same as that of trade-marks; the only difficulty to be met is that of establishing that the use of a name which is complained of tends to injure reputation or interferes with the complete enjoyment thereof. Of course, this advantage does not exist in cases where an act directly injures the person,—such acts are also actionable as matter of law. But the injury to the person must be very clear, and this class is necessarily very limited. In no case, it would seem, could a corporation be injured in its personality *per se,* it is always compelled to show special damages.

As has already been intimated, the second alternative for the course of development in the field under discussion is by recognition of new secondary property rights which the law can protect on principles analogous to those governing trade goodwill in its relation to its symbols. A few of the more common rights which would thus be recognized as property are trade and professional reputation, the reputation of goods on the market, corporate reputation in business, etc.

Among such rights would be that of Vassar College to its reputation if the principles of property in reputation were broadly construed Any act which would injure or detract from reputation as an institution of learning, whether the injury resulted from the improper use of its name, or from any cause, would be a violation of its property, and could be enjoined.

All the forms of reputation which are mentioned above are now covered by the law of so-called trade libels. The courts have for the most part failed to recognize them as distinct and different in nature from the purely personal libels and have attempted to apply the same remedies which a long experience has shown to be adequate for pure libels. It seems to be a very

long stretch of the imagination to include them under that category of rights to personal security, where Blackstone places the right to reputation,—the other rights mentioned with the right to reputation being those to life, limb, body, health, etc. Clearly libels of goods and means of livelihood have nothing in common with violations of the above rights,—they are entirely impersonal. Are they not, on the other hand, just as clearly within that category called the right of property,—viz., the right to be secure in the exclusive enjoyment of that which the individual has by his own effort created or acquired?

The courts have with varying degrees of consistency based the relief on the ground of injury to the person, but in some regards, such as in the matter of damages, all courts have been forced to recognize the impersonal character of trade libels; in all jurisdictions proof of special damages is essential to the cause of action. We submit that the reason why the whole field of libel is in such an unsatisfactory condition is that there exist in it many embryo forms of property right which are in various stages of development and judicial recognition. This view is supported by a dictum of Lord SELBORNE in *Re Riviere's Trademark,* 26 Ch. D. 48, at 53, in which he disapproved the case of *Clark* v. *Freeman,* 11 Beav. 112, where the right of a physician to enjoin the unauthorized use of his name on a patent medicine was refused; Lord SELBORNE indicated his belief that professional reputation should be protected as property. In reference to the same case (*Clark* v. *Freeman*) Lord CAIRNS in *Maxwell* v. *Hogg,* L. R. 2 Ch. App. 305, said, "It always appeared to me that *Clark* v. *Freeman* might have been decided in favor of the plaintiff on the ground that he had a property right in his own name." Apparently Lord CAIRNS meant name or reputation in the medical profession and not name in the ordinary sense, (and this view also explains several dicta, which taken apart from the cases in which they occur might be understood to support an abstract right of property in a name. *Chem. Co.* v. *Meyer,* 139 U. S. 540; *Edison* v. *Polyform Co., supra, Dixon* v. *Holden,* L. R. 7 Eq. Cas. 488). In criticizing *Marlin* v. *Shields,* 171 N. Y. 384, NIMS (UNFAIR B. COMP. 205) says, "The court ignored what it is believed will eventually be the basis on which equity will give relief in similar cases in the future, viz., that the good repute of merchandise is property. The reputation of the Marlin Rifle for having an effective ejector is property, is valuable, and for a court of equity to sit by and see the reputation of that article injured by statements of the character of those disclosed here, is to take a narrow view of the powers of equity, which its history does not warrant."

B. W. S.